DEPARTMENT OF CONSTITUTIONAL LAW.

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STATE *v.* CAREY.[1] SUPREME COURT OF STATE OF WASHINGTON.

Constitutional Law—State Rules for Medical Practitioners.

"Laws of 1889–90 of the State of Washington, page 114, which provide that thereafter no person should be licensed to practice medicine except after examination by the State Medical Examining Board, to be appointed by the Governor, is not in conflict with the Constitution of the United States. Amendment 14, section 1, providing that no State shall make any law abridging the privileges and immunities of citizens of the United States, nor deprive any person of . . . property without due process of law, nor deny to any person the equal protection of the laws."

Note Explanatory of the Act in Question. — The Act in question (March 28, 1890), briefly stated, provides for the appointment by the Governor of a board of examiners, to be known as the State Medical Examining Board, consisting of nine members learned and skilled in the practice of medicine; requires that hereafter all persons desiring to commence the practice of medicine or surgery in the State of Washington shall make a written application to said board setting forth the nature of the medical education he or she has received, or to what extent, if any, he or she has engaged in practice, and other matters, accompanied by an affidavit relative to the personality of the applicant; and prescribes the examination to which such applicant is compelled to submit before the board upon the acceptance of the application.

A fee of $10 is to be paid by the applicant, which is to go toward defraying the expenses of the examining board.

The board is to have the power to revoke a license for unprofessional conduct, subject to a certain right of appeal.

The person receiving said license is to file the same, or a copy for record, with the clerk of the county court of the county in which he or she resides. The penalty prescribed for practicing medicine without having obtained the license in the manner set forth in the Act, is a fine of not less than fifty, nor more than one hundred dollars, the offence being declared a misdemeanor.

An express exception is made in favor of dentists.—*Hill's Annotation, Code and Statutes of Washington*, Vol. I. §§ 2844–2852.

[1] Reported in 30 Pac. Rep., 729.

STATEMENT OF THE CASE.

The appellant in this case had been arrested and convicted of practicing medicine without having obtained the license required by the statute, and appealed, alleging among other matters, that the statute was in conflict with the Federal Constitution (as above), in that it deprived him of the right to the free practice of his profession.

The Court, in an opinion delivered by DUNBAR, J., from which ANDERS, C. J., dissented, upheld the constitutionality of the Act, saying that it was within a proper exercise of the Police Power of the State.

THE FOURTEENTH AMENDMENT AND THE REGULATIONS OF THE PRACTICE OF MEDICINE UNDER THE STATUTES OF VARIOUS STATES.

Object of Passage of Fourteenth Amendment.—In considering the application of any portion of the Constitution to the facts of a case at bar it is always necessary to bear in mind the object with which the particular clause in question was adopted and under what circumstances it became a part of the law of the land. (See MILLER, J.'s opinion in Slaughter House Cases, 16 Wallace, 36.)

Although many attempts have been made to claim exemption from the operation of State statutes under the Fourteenth Amendment, on the ground that that amendment conferred upon all persons justly claiming United States citizenship new and specially emphasized rights and privileges, it is now well understood, and has so been repeatedly decided by the Supreme Court of the United States, that the primary object of the adoption of the last three amendments to the Constitution was to complete the emancipation of the negro race and to place it as far as possible upon an equal footing with the formerly dominant white race: Slaughter House Cases, 16 Wallace, 36; Minor *v.* Happeruth, 21 Wallace, 162; U. S. *v.* Cruikshank *et al.*, 2 Otto, 502; Mann *v.* Illinois, 4 Otto, 113; Strouder *v.* W. Va., 10 Otto, 303; Virginia *v.* Reeves, 10 Otto, 313; *Ex parte* Virginia, 10 Otto, 339; Neal *v.* Delaware, 13 Otto, 370; Civil Rights Cases, 109 U. S., 2; *In re.* Kemmler, 136 U. S., 936.

Thus the Fourteenth Amendment did not confer upon citizens of the United States any privileges or immunities which they did not possess before its passage. See especially MILLER, J.'s opinion in Slaughter House Cases, *supra*, and WAITE, C. J.'s opinion in Munn *v.* Illinois, *supra*.

THE FOURTEENTH AMENDMENT DOES NOT IMPAIR THAT POWER OF THE STATE WHICH IS KNOWN AS THE POLICE POWER.

This reserve power of the States —one not granted to the Federal Government—has been the ground for the enactment of a great variety of State acts regulating widely different subjects, from the manufacture of oleomargarine in Pennsyl-

vania, or the brewing of beer in Kansas, to the practice of medicine in Washington, or the washing of clothes in New Hampshire. In his opinion in the case under discussion, DUNBAR, J., remarked that "the scope of this power has been the subject of much controversy, and the term has been variously defined by courts and text writers."

Definitions of "Police Power."—Among the best definitions are those of FIELD, J., in Barbier *v.* Connolly, 113 N. Y., 27: "The Police Power is that power which the State has to prescribe regulations to promote the health, peace, morals, education, and good order of the people," and of SHAW, J., in Commonwealth *v.* Alger, 7 Cushing, 84, "the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances either with penalties or without, not repugnant to the Constitution, as they shall judge to before the good and welfare of the Commonwealth and of the subjects of the same." (See also REDFIELD, C. J., in Sharpe *v.* Ruttard and Burlington Ry., 27 Vermont, 149; BRADLEY, J., in Beer Co. *v.* Massachusetts, 97 U. S., 25; also Cooley's Constitutional Limitations, p. 572; and Tiedeman's Limitations of the Police Power, § 1, p. 1.) (Also see 4 Blackstone's Com., 162.)

Extent to which the Police Power has been Exercised since the Fourteenth Amendment.—The following cases are illustrative of the extent to which the police power has been exercised by the various States, and recognized by the Supreme Court of the United States since the adoption of the Fourteenth Amendment:

A Statute of Louisiana "restricting the slaughtering of cattle within a certain area," although it granted a virtual monopoly, was held constitutional in Slaughter House Cases: 16 Wallace, 36.

"A State can regulate the sale of beer or intoxicating beverages. The right to sell beer is not a right vested in United States citizenship:" Bartemeyer *v.* Iowa, 18 Wallace, 129.

But this question of the regulation of the sale of intoxicating beverages was again determined in the case of Mugler *v.* Kansas and Kansas *v.* Ziebold, 123 U. S., 623, in which the Court went to the extent of declaring that under the Police Power a State may enact a statute which will cause the abatement as a nuisance of the premises of a manufacturer whose business is, in the mind of the legislature, injurious to the public welfare. In Powell *v.* Pennsylvania, the same general principle was held to apply to the manufacture and sale of oleomargarine: 127 U. S., 678.

"A State can require all persons whose business is affected with a public interest" (in this instance the storage of grain in elevators), "to charge only such rates as shall be reasonable," and can even go farther and declare what rates shall be reasonable: Munn *v.* Illinois, 4 Otto, 113. See also "Granger" Cases (reported in same volume), in which the above doctrine was applied to the business of a common carrier. But see Chicago, Milwaukee and St. Paul R. R. *v.* Minnesota, 134 U. S., 418.

"An ordinance prohibiting the washing of clothes in public laundries, except at certain hours," was held a proper exercise of the Police Power in Barbier *v.* Connolly, 113 U. S., 27. See also Yick Wo. *v.*

Hopkins, 118 U. S., 356, in which the same general doctrine was reiterated, although the act in question was for other reasons declared unconstitutional.

A sufficient number of cases have been cited to show the wide extent to which the Police Power (for farther instances see Cooley's Chapter on the Police Power in Coast Line), has been held to authorize State legislation since the adoption of the Fourteenth Amendment—legislation affecting subjects of very various character—in each of which cases the attempt was unsuccessfully made to claim the impairment of the power by the amendment.

It remains to be seen whether the regulation of the practice of medicine is also embraced by the Police Power, and, if so, whether the particular act under discussion is free from objectionable and unconstitutional features.

The question has been decided by the Supreme Court in the case of Dent. *v.* West Virginia, 129 U. S., 114. Justice FIELD delivered the opinion, and as it was he who so often dissented from the majority of the court in those cases (cited above) which supported the police authority of the State, the decision has, on that account, all the more force. "The State, in the exercise of its power to provide for the general welfare of its people, may exact from parties before they can practice medicine, a degree of skill and learning in that profession upon which the community, employing their service, may confidently rely, and to ascertain whether they have such qualifications require them to obtain a certificate or license from a board or other authority competent to judge in that respect. If the qualifications required are appropriate to the profession, and attainable by reasonable study and application, this validity is not subject to objection, because of their stringency and difficulty."

Although this is the only instance in which the Supreme Court has passed upon the right of a State on this particular subject of legislation, the decision leaves no room for doubt as to the proper application of the Police Power to such questions, and indeed there seems to be no business or profession to the strict supervision over which State authority may be more appropriately applied than the practice of medicine.

[See also Hewett *v.* Charier (Mass.) 16 Pickering, 353; Eastman *v.* State, 7 West, 421, and authorities cited; Gosnell *v.* State (Ark.) 12 S. W., 392; State *v.* Creditor (Kan.) 24 Pac., 346; Cooley's Constitutional Lim., p. 745; Tiedeman's Lim. of Police Power, §§ 87 and 88.]

IS THE WASHINGTON STATUTE ITSELF UNCONSTITUTIONAL OR OBJECTIONABLE IN ANY PARTICULAR?

It is necesary, first, to consider the manner in which the statutes of the other States deal with the subject, and in so doing it is convenient to divide them into three general groups:

The first group, comprising those States in which there is no statutory mention made of a standard of qualifications for the practice of medicine.

The second group; those States whose statutes prescribe a definite standard of proficiency, upon producing proof of which the applicant may obtain a license.

The third group; those States in which the power of determining the admission of applicants to practice is conferred upon a State board (and, in some instances, upon associate boards) either created for that express purpose, or exercising the right in connection with other duties.

Of the first group there are only two States, Connecticut and Rhode Island. Laws of 1887, ch. 53 of Connecticut, prescribe regulations for the practice of dentistry, but there are no statutory provisions for general practitioners, except that itinerant practitioners must have license. In Rhode Island there is the requirement that physicians are to "register name and residence with town clerk:" Pub. Statutes R. I. (1885), ch. 85, § 12, but nothing more.

SYNOPSIS OF THE REQUIREMENTS OF THE VARIOUS STATE STATUTES.

The following States fall within the second group:

[NOTE.—In each instance the diploma or certificate required by the statute must be recorded at the proper place—generally the office of the clerk of the county court in the county in which the applicant desires to practice and reside—and in most cases must be accompanied by an affidavit of its genuineness and the oath of some one or more responsible persons identifying the holder thereof. The quotations are descriptive of the nature of the diploma or certificate called for.]

Arizona: Physicians must have diploma from "some regular medical college of the United States:" Rev. Statutes, §§ 618-621.

Georgia: Diploma from "an incorporated medical college:" Acts of 1880, pp. 172-3.

Indiana: Diploma from "a reputable medical college" (see State, *ex rel. v.* Green, 112 Ind., 467): Act March 9, 1892.

Idaho: diploma from "a regularly chartered medical college": Rev. Statutes (1887) §§ 1298-1298 (*e*).

Kansas: diploma from "a reputable school of medicine either in the United States or a foreign country, or certificate from some State, or county medical society:" Laws of 1870, ch. 68, § 1.

Maine: diploma from "a public medical institution of the United States or certificate from the Maine Medical Society:" Rev. Statutes, ch. 13, § 3.

Massachusetts: diploma from "Harvard Medical School; or certificate from State Medical Society:" Act of 1818.

Michigan: diploma from "a legally authorized medical college in United States:" Annot. Sts. (1890), §§ 2287 (*b* 2)—(*b* 8).

Nevada: diploma from "a regularly chartered medical school:" Acts of 1875.

Nebraska: diploma from "a legally chartered medical school or college in good standing:" Acts of 1891, ch. 35.

[NOTE.—The requirements of this Act differ from those of the other States in that the diploma must first be presented to the Board of Health, which grants a certificate. The certificate is then filed at the recording office.]

New Jersey: diploma from "a legally chartered medical college:" Act of March 12, 1880.

Ohio: diploma from "a reputable medical college in this or a foreign country," *and* "a certificate from a State or county medical society:" Rev. Sts. (1892), § 4403.

Pennsylvania: diploma from "a chartered medical school duly au-

thorized to confer," etc.: Acts 24th March, 1877, and 8th June, 1881.

Texas: either certificate from "some board of medical examiners," or "diploma from "some medical college:" Act March 26, 1879.

Wyoming: diploma from "some regularly chartered school of medicine:" Laws of, (1887), § 1925.

Wisconsin: diploma from "some incorporated medical college," or must be "a member of some State or county medical society:" Annot. Sts. (1889), §§ 1436–37.

The States falling within the third group are:

[NOTE.—The quotations are descriptive of the form and mode of appointment of the board. In each instance the certificate from the board must be recorded, and where diplomas are presented to the board they must be accompanied by the usual affidavit and oath of identification. In some cases an examination is *necessary*, whether the applicant is a graduate in medicine or not. In the others the examination is only necessary in the absence of a diploma.]

Alabama: "Board of Censors of Medical Association of the State with Associate Board in each county." A diploma passes: Act Feb. 12, 1879. (See Harrison *v.* Jones, 80 Ala., 412.)

Arkansas: "Board appointed by governor; county boards appointed by judges of county courts." No provision as to diplomas: Act of March 9, 1881.

California: "Board appointed by three (3) (certain) medical societies of the State." Diploma passes: Act of April 1, 1878. See *ex parte* McNulty, 19 Pac., 237.

Dakota: "Board composed of superintendent of public health and associate physicians." A diploma passes: Laws of 1887, sec. 14, ch. 63.

Delaware: "Composed of a certain medical society called, etc." Diploma passes: Acts of 1887, p. 79, amending Act of 1883.

[NOTE.—The certificate obtained from the board must be countersigned by the governor and secretary of state—an unique provision.]

Florida: "Governor to appoint six boards in six sections of the State." Diploma passes: Acts of March 7, 1871, and see Laws of 1887, p. 141.

Colorado: "Appointed by Governor." Diploma passes: Act of March 4, 1881. See Harding *v.* People, 15 Pac., 727.

Illinois: "State Board of Health the examining board." Diploma passes: Act June 16, 1887.

Iowa: "Physicians and secretary of Board of Health." Diploma passes: Act of April 9, 1886.

Kentucky: "Appointed by governor." Diploma passes: Act of February 23, 1874.

Missouri: "State Board of Health the examining board." Diploma passes: Laws of 1883, p. 115.

Montana: "Appointed by governor." Examination *necessary:* Act February 28, 1889. (But see Craig *v.* Board Med. Ex., 29 Pac., 532.)

Maryland: "Appointed by regents of University of New York." Diplomas from schools of medicine within the State pass. Those from schools without the State pass only when countersigned by regents of University of New York after examination: Laws of 1887, I Rev. Sts., 452, § 1.

New Mexico: "Appointed by Governor." Diploma passes: Laws of 1882, ch. 55, § 1.

North Carolina: "Appointed by Medical Society of North Carolina." Diploma passes: Laws of 1885, ch. 17, and of 1889, ch. 81. See State *v.* Van Doran, 109 N. C., 864.

Oregon: "Appointed by governor." Diploma passes: Acts of 1889, p. 144, and of 1891, p. 153.

South Carolina: "appointed by Governor;" diploma passes: see State *v.* Board Med. Ex., 6 S. E., 824: Laws of 1887, p. 820.

Tennessee: "appointed by Governor: diploma passes: Act of 1889, ch. 178.

Vermont: "Board of Censors elected by chartered medical societies: no examination: either diploma or "certificate from a medical soeiety" necessary: Sts. of 1880, §§ 3908-16.

Virginia: "appointed by governor:" no examination necessary: Sts. of 1887, §§ 1244-53.

West Virginia: "Board of Health:" diploma passes: Act of February 22, 1889.

Washington: "Board appointed by governor:" examination necessary: State *v.* Carey: Annot. Sts. of Washington, sects. 2844-52.

Thus the Washington statute is of the class which demands of the applicant for license to practice a compliance with requirements of the greatest stringency. The Acts of only three (3) other States contain the provision that in all cases an examination is necessary whether the candidate be a graduate in medicine or not, namely, *Arkansas*, *Montana* and *Virginia*. Of these three that of *Montana* only has been passed upon by the courts, the Act being declared constitutional in Craig *v.* Board of Medical Examiners, 29 Pac., 532. That the legislature can delegate to its agent (the board in this case) the exercise of any constitutional power it may itself exert is well settled (see Chicago, Milwaukee and St. Paul R R. *v.* Minn., 134 U. S., 418), and the objection that the board has conferred upon it power too arbitrary cannot be sustained, as the form and extent of the examination in specifically set forth in the statute: State *v.* Fleischer, 41 Minnesota, 69; Brown *v.* People, 11 Colorado, 109.

Indeed, the form of the statute would seem particularly well adapted to carry out within constitutional lines the object which is sought to be attained. An uniform standard of proficiency is established for all practitioners; all must submit to a common test, while under those regulations which provide for the acceptance of diplomas there must of necessity result a more or less irregular standard. (See especially the Acts of *New York* and *South Carolina.*) *It remains to notice the other general provisions of the various Acts above mentioned, and the decisions of the Courts on particular points.*.

In nearly all the States the offence of practicing without having complied with the statutory requirements is either expressly declared a misdemeanor or a fine is imposed. In *Ohio*, *Massachusetts* and *South Carolina*, however, there is merely the provision that no compensation can be recovered In *Indiana* the license is void. Fox *v.* Dixon, 12 N. Y., 267: "There can be no recovery of compensation by one convicted of practicing unlawfully under a statute declaring the offence a misdemeanor, even if no special mention is made thereof;"

and see Orr *v.* Meek (Ind.), 11 N. E., 787; Haworth *v.* Montgomery, 18 S. W., 399; Underwood *v.* Scott, 43 Kan., 714; Gardner *v.* Tatum, (Col.), 22 Pac., 880.

There is an express exception in nearly all the States in favor of physicians and surgeons "in good standing" coming from other States for purposes of consultation or to perform a particular operation. *Virginia* has the unique provision that "physicians living within an adjoining State, within ten mile of the border, may have the license privilege of the State of Virginia:" State *v.* Van Doran, 109 N. C., 804. Midwives are, in most instances, expressly exempted from operation of the statute, but in *Idaho* and *Vermont* they are expressly included.

Those administering drugs in an emergency are in some instances declared not to be regarded as "attempting to practice," and in *Nevada*, *Wyoming*, *Idaho* and *California* there is an exception made in favor of persons acting in the capacity of physicians in places remote from the residence of a regular practitioner: See People *v.* Lee Wah, 71 Cal., 80.

In some States there is the requirement that itinerant practitioners shall take out a special license: See State *v.* Ragland (W. Va.), 7 S. E., 424.

THE FOLLOWING DECISIONS ARE UPON SPECIAL PROVISIONS OF CERTAIN STATUTES OR UPON POINTS NOT FALLING UNDER ANY OF THE PREVIOUS HEADS:

(*a*) *Power of Board of Examiners.*—Where there is the provision that a diploma renders the examination unnecessary, it is for the board to determine whether the standard of the school or college from which it has been obtained is satisfactory, or within the definition of the statute: State *v.* Board of Health of N. J., 22 At., 226; State *v.* Vanderslice, 43 N. W., 789; Townshend *v.* Gray, 19 At., 635; Barmore *v.* Dickson, 28 Pac., 8. But if the board abuses this privilege a mandamus lies to compel issuance of license: Illinois Bd. *v.* People, 13 N. E., 201. The power of determining the standing of a school from which diplomas are accepted is not unconstitutional as discriminating against those who may not have been able to attend such schools: State *v.* Vanderslice, *supra*. "The board of examiners does not exercise judicial powers within the meaning of our Constitution:" Wilkins *v.* State, 16 N. E., 192. "The State Board of Examiners (of Colorado) being *de facto* the State Board of Medical Examiners, its certificate protects the holder from prosecution, notwithstanding the mode of appointment might be unconstitutional:" Brown *v.* People (Col.), 67 Pac., 104. "The board is not improperly formed, because there is not an equal representation therein of the various medical schools named in the Act:" Gen. Sts. of Col., 773. *Idem.*

(*b*) *Registration, etc.*—"Laws of 1880 c. 513 of N. Y., compelling physicians to register in the county in which they practice does not compel them to register in another county before visiting patients therein:" Martins *v.* Kirk, 8 N. Y., S. 758. But see, on the other hand, Sect. 4 of Laws of Indiana (Ap. 11th, 1885), which provides that "Any person who shall practice medicine without having first procured from the Clerk of the Circuit Court wherein he or she shall practice

shall be guilty of," etc., means that a physician must procure a license in each county in which he practices: Orr *v.* Meek (Ind.), 17 N. E., 787. "Act of 1887 (Pa.) imposing a license fee on physicians opening a *transient* office is inconsistent with Act of 1881 (June 8) and is hereby repealed, so that now no authority exists for requiring such license in question:" Peebles *v.* Wayne Co., 10 P. C. Ct., 69. "A physician who is regularly registered in the county where he resides, under the Pa. Act of June 8, 1881, but who has an office in another county (in which he is not registered) is, by practicing in the latter county, guilty of a violation of the Act of 1881:" Ege *v.* Commonwealth (Pa.) 9 At., 471.

(*c*) *Revocation of License.*—Act of Feb. 28 (Montana) providing that "the Board of Medical Examiners may revoke license on account of unprofessional or immoral conduct, and that in all cases of revocation the applicant may appeal to the District Court," does not give the board the power to revoke without reasonable notice to physician of the charge against him and time and place of trial: State *v.* Schultz, 28 Pac., 643; Same *v.* Wegerhorst, Id. 644. See also under this head, State *v.* State Bd. Med. Ex., 32 Minn., 324; Veterinary Surgeon's Case *v.* Pa. Co. Ct. Rep. 185; State *v.* Green (Ind.), 14 N. E., 352.

(*d*) *Constitutionality of Certain Acts or Parts of Acts.*—"The Act of Pennsylvania, April 11, 1889, providing that veterinary surgeons of five years standing who are not entitled to use the degree of V. S. shall register within six months or be guilty of a misdemeanor in using the title thereof, is unconstitutional as depriving a person of property without due process" (*i. e.*, violates the Bill of Rights): Ritter *v.* Rodgers, 8 Pa. Co. Ct. Rep, 451; but in Veterinary Surgeon's Case (*supra*) it was held that the Court of Common Pleas had no jurisdiction to strike a name from the registry nor pass upon the constitutionality of the Act.

"General laws of New Hampshire, ch. 132, requiring that all physicians must take out license except those who had resided and practiced in one town from date to date, is unconstitutional as discriminating in favor of a class:" State *v.* Pennoyer, 18 A. 878.

"Provisions of Indiana, Act of April 11, 1885, making residence in that State for a certain number of years one of the necessary qualifications of an applicant for a license to practice medicine, do not grant privileges or immunities to citizens of Indiana not given to citizens of other States:" State *v.* Green (Ind.) 14 N. E., 352; and see cases referred to in connection with statutes cited above.

(*e*) *For cases showing sufficiency of indictment in criminal prosecution for practicing unlawfully, and what constitutes proof of practice*, see State *v.* Hathaway, 106 Mo., 236; State *v.* Van Doran, 109 N. C., 864; Dee *v.* State, 68 Miss., 601; Davidson *v.* Bohlman, 37 Mo. App., 576; People *v.* Fulda, 4 N. Y. S., 945; Denton *v.* State (Neb.), 32 N. W., 222; State *v.* Fussell, 45 Ark., 65; People *v.* McCoy (Ill.), 17 N. E., 786; People *v.* Phipper, 70 Mich., 6; Benham *v.* State, 116 Ind., 112, and State *v.* Carey (*supra*).

(*f*) *On the question of the recovery by a physician under a statute of compensation for service rendered*, see McNamara *v.* Clintonville, 62 Wis., 207.

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